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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OKSANA BAIUL-FARINA, Plaintiff and Appellant, v. CROWN MEDIA HOLDINGS, INC., et al., Defendants and Respondents.	B279653 (Los Angeles County Super. Ct. No. BC586048)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

U.S. Law Group and Usman Shaikh for Plaintiff and Appellant.

Schnader Harrison Segal and Lewis, Law Office of Dennis O. Cohen and Dennis O. Cohen; Baker Hostetler and Teresa

Carey Chow, for Defendant and Respondent Sonar Entertainment.

Kelley Drye & Warren, David E. Jang and Andreas Becker; Venable and David E. Fink for Defendant and Respondent Crown Media Holdings.

INTRODUCTION

After plaintiff Oksana Baiul-Farina (Baiul) achieved fame as a competitive figure skater, her loan-out company, Olympic Champions Limited (OCL), entered into a contract with RHI Entertainment Inc., predecessor to defendant Sonar Entertainment, Inc., to make a movie about Baiul's life. In this lawsuit, Baiul asserts that Sonar failed to pay the profit participation owed to Baiul under that 1994 contract. Baiul also contends that defendant Crown Media Holdings, Inc. distributed or aired the movie, and failed to pay Baiul the profit participation owed under the contract.

Baiul sued defendants for breach of contract, fraud, restitution, and accounting. After denying Baiul's motion for summary adjudication and deciding several discovery motions, the court granted summary judgment for defendants, finding that OCL—not Baiul—was the party to the contract at issue, and therefore Baiul did not have standing to sue for breach of the contract. Baiul appealed, challenging the trial court's findings on summary judgment, as well as the motion for summary adjudication and the trial court's sanctions orders relating to the discovery motions.

We affirm. OCL, not Baiul, was the party to the contract with RHI. Baiul has not established that she has standing as a

third party beneficiary to the contract, or that she is a successor in interest to OCL. Baiul also did not demonstrate that the summary judgment hearing should be continued until she conducted further discovery. For the same reasons, the trial court's denial of Baiul's motion for summary adjudication was not error. We also find no error in the trial court's rulings regarding sanctions relating to the discovery motions.

I.

Baiul sued Sonar (as successor in interest to RHI) and Crown, alleging causes of action for breach of contract, fraud, restitution, and accounting. The first amended complaint (FAC) was the operative complaint at all relevant times, and therefore we focus on the allegations in that version of the complaint.

The conflict centers around what the parties call the "rights agreement," which Baiul attached to the FAC as an exhibit. It is a May 11, 1994 contract in which RHI acquired the "exclusive motion picture rights and allied rights in and to the real-life story of Oksana Baiul." The rights agreement was in letter form addressed to "Olympic Champions, Ltd. c/o The William Morris Agency, Inc." It purported to "confirm the basic agreement between you ('Owner') and RHI." It acquired rights for one year for $100,000, "applicable against a purchase price of $500,000."

Baiul focuses primarily on the profit participation clause in paragraph 2 of the rights agreement, which stated that if RHI produced a motion picture, "in addition to the sum hereinabove provided, RHI shall pay to Owner 30% of 100% of 'first dollar' gross revenue generated at the source with respect to the exercise of any rights herein granted after deducting therefrom only actual, direct, third party costs of production. . . ." Baiul also relies on paragraph 9 of the rights agreement, which stated in

part, "All payments due Owner hereunder will be made payable to and in the name of William Morris Agency, Inc. as agent for Olympic Champions Ltd. Statements describing the computation of all participations shall be prepared and delivered to the William Morris Agency, Inc. within 60 days after the end of each calendar quarter, together with payment of any sums disclosed to be due. Owner shall have the right to audit the books and records of RHI Entertainment, Inc. solely with respect thereof . . . ."

The rights agreement also acquired the rights "of Victor Petrenko and Galina Zmievskaya but solely to the extent of their roles in the life of Oksana Baiul." It stated, "Owner represents that the Rights are exclusively owned and controlled by Owner." The rights agreement was signed by representatives for RHI and the William Morris Agency. In addition, four signatures appeared under the phrase "agreed to and accepted by: Olympic Champions, LTD": Baiul, Petrenko, Zmievskaya, and one signature that is not labeled.

Baiul also attached to the FAC a "life story release," which referenced the rights agreement as "the memorandum agreement, by and between RHI Entertainment, Inc. and Olympic Champions, Ltd. f/s/o Oksana Baiul, Victor Petrenko and Galina Zmievskaya." It stated that RHI had "assigned its rights in this project to Signboard Hill Productions, Inc." The life story release allowed Signboard Hill "to use my name, likeness, and biography" in connection with a motion picture. The life story release was signed by Baiul, Petrenko, Zmievskaya, and an "authorized officer" of OCL, which appears to also be Zmievskaya.

In her FAC Baiul alleged that OCL, a British Virgin Islands corporation, was "a 'loan out' company for [Baiul's]

services and rights."[1] She alleged that OCL ceased business and lost its corporate franchise before 2011, and Baiul "is the successor in interest to OCL with respect to the sums due pursuant to the Rights Agreement and the Life Story [release]." Baiul is the only plaintiff named in the FAC.

Baiul alleged that RHI produced a television movie, "A Promise Kept: The Oksana Baiul Story" (the movie). She alleged that "RHI was obligated to pay OCL 30% of 100% of 'first dollar gross revenue generated at the source'" under paragraph 2 of the rights agreement but failed to do so. She also alleged that "RHI was obligated to deliver to OCL" the financial statements required by paragraph 9, but did not. She further contended that "RHI and Sonar have licensed distribution rights for the [movie] to Defendant Crown Media Holdings, Inc." without accounting to OCL for the revenue generated.

Baiul also attached to her FAC a "participation statement" from Sonar to OCL, dated "[f]rom inception to May 31, 2014." (Later in the litigation, Baiul would refer to the participation statement as the "disputed statement," so we will use that term here.) The disputed statement included two pages of sales and receipts, which are largely illegible in the copy included in the record on appeal. The cover page, which is more legible, listed gross receipts as $1,812,541, Sonar's advance as $3,500,000, and "net receipts for distribution" as "$(1,687,459)."

In her first cause of action for breach of contract against both defendants, Baiul alleged that defendants breached the

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[1] Loan-out corporations are commonly used in the entertainment industry to contract out the services of individual performers. (See, e.g., *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 885.)

rights agreement and life story release "by failing and refusing to account to and pay OCL or [Baiul]" pursuant to those agreements. In the second cause of action for fraud against only Sonar, Baiul alleged that paragraphs 2 and 9 of the rights agreement were "false statements," in that defendants "intentionally and/or recklessly did not" pay OCL or Baiul the profit participation, and they did not intend to. In the third cause of action for "specific restitution" against both defendants, Baiul alleged that due to defendants' breaches, Baiul "hereby elects to rescind and revoke the Rights Agreement and the Life Story [release]." In the fourth cause of action for an accounting against both defendants, Baiul stated that "an accounting is necessary and appropriate since the exact and precise monies due to [Baiul] are unknown to [Baiul] and cannot be ascertained without an accounting." She alleged that defendants' actions constituted continuing violations, and that they were not discoverable earlier. Baiul prayed for compensatory damages of "not less than $10,000,000," punitive damages "in an amount no less than $20,000,000," declaratory relief, restitution, an accounting pursuant to the rights agreement, attorney fees, and costs.

Sonar and Crown each filed an answer to the FAC. Sonar also filed a cross-complaint against Baiul, alleging that by attaching the disputed statement to the FAC, Baiul violated a protective order entered in a different litigation between Sonar and Baiul in New York. Sonar sought declaratory relief, an injunction, and monetary damages.

On appeal, Baiul challenges court rulings relating to four separate court orders: the order granting defendants' motion for summary judgment, the order denying Baiul's motion for

summary adjudication, and the court's rulings as to sanctions in two orders relating to discovery motions. As defendants' motion for summary judgment was dispositive and the issues in Baiul's motion for summary adjudication were similar, we discuss those motions first. We then turn to Baiul's contentions of error as to the court's sanctions rulings. First, however, we address the parties' motions and Baiul's request for judicial notice, which affect the scope of the documents to be considered on appeal.

II.

Baiul filed an opening brief, and Crown moved to strike portions of it on the basis that Baiul relied on facts that were not supported by the record on appeal. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"] and rule 8.204(a)(2)(C) [an opening brief must "[p]rovide a summary of the significant facts limited to matters in the record."].) We granted Crown's motion, striking specific portions of the opening brief and allowing Baiul to file an amended opening brief with appropriate citations to the record. Baiul filed an amended opening brief along with her reply briefs. We have relied on Baiul's amended opening brief for this opinion.

Defendants then filed a joint motion to strike portions of Baiul's amended opening brief and her reply briefs, asserting again that Baiul relied on facts not supported by the record. We deny the motion, as we find it unnecessary to strike portions of Baiul's briefs. Although portions of the briefs do not comply with the California Rules of Court in that they rely on facts not included in the record on appeal, we may disregard the noncompliance without striking the brief. (Cal. Rules of Court,

rule 8.204(e)(2)(C).) We have given no consideration to facts in Baiul's briefs that are not supported by the record.

Crown requested permission to file an amended respondent's brief to address Baiul's amended opening brief. We granted Crown's request, and have relied on Crown's amended respondent's brief here.

Baiul also filed a motion to augment the record on appeal and a request for judicial notice. The motion to augment included three documents: The trial court's order on Baiul's motion for reconsideration, a September 12, 1994 memo regarding "Sunday movie budgets," and an August 22, 1994 "Assignment and Assumption of All Rights" between RHI and Getting Out Productions, Inc.

A "reviewing court may order the record augmented to include . . . [a]ny document filed or lodged in the case in superior court." (Cal. Rules of Court, 8.155(a)(1)(A).) The court's order on Baiul's motion for reconsideration was not included in the clerk's transcript, apparently because it was filed after the notice of appeal and designation of record. We grant Baiul's motion to augment the record to include the court's ruling on the motion for reconsideration.

As to the other two documents, however, the motion is denied. It does not appear that these documents were filed in the trial court. Baiul states in her motion that the second document, the 1994 memo, was "filed conditionally under seal" in the trial court. She references a declaration in the record filed with Baiul's opposition to defendants' motions for summary judgment. The declaration states that the memo was "provided to this Court and opposing counsel as Sealed Exhibit A to the Markovich Decl." However, the record does not include any indication that the

document was actually submitted to the trial court. The record does not include a notice of lodging the document conditionally under seal, motion to seal, publicly redacted version, or any other indication of compliance with California Rules of Court, rule 2.551. In their opposition to Baiul's motion to augment, defendants state that the 1994 memo was never lodged or filed with the trial court. "Augmentation does not function to supplement the record with materials not before the trial court." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 fn. 3.) The motion to augment is therefore denied as to this document.

Baiul states that the third document, the assignment and assumption of rights, was "provided in discovery." Because there is no indication that the document was filed in the trial court, it may not be included in the record on appeal by augmentation. The motion is therefore denied as to this document.

In her request for judicial notice, Baiul requested judicial notice of the following: the movie, a 1992 press release regarding Signboard Hill Productions, a screen shot of Baiul from the movie, a 1994 news article about the movie, a 1994 press release regarding RHI acquiring rights to Baiul's story, screen shots depicting the movie's packaging, a 1994 press release announcing Hallmark's acquisition of RHI, several documents from other litigations involving Baiul, and several documents relating to the William Morris Agency. As none of these documents are relevant to the questions before us on appeal—whether the trial court erred in granting summary judgment or in its discovery sanctions orders—Baiul's request for judicial notice is denied. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 fn. 4.)

III.

On appeal, Baiul challenges the trial court's order denying her motion for summary adjudication, and the court's order granting defendants' motion for summary judgment. As the issues in these motions overlap, we discuss the two motions together.

A. Baiul's motion for summary adjudication

1. *Motion*

Baiul filed a motion for summary adjudication of her accounting cause of action, certain affirmative defenses asserted by defendants, and Sonar's cross-complaint. She asserted that RHI, predecessor to Sonar, entered into the rights agreement and life story release. She asserted that pursuant to paragraph 2 of the rights agreement, Sonar/RHI was required "to pay [the profit participation to] OCL for the benefit of [Baiul]." She further contended that paragraph 9 of the rights agreement required Sonar "to provide to OCL statements describing the computation of all participations within 60 days after the end of each calendar quarter." However, Sonar issued only the disputed statement, which purportedly reflected "Participation . . . from Inception to May 31, 2014." Baiul contended that the disputed statement was "a long account with more than 150 entries on its face," which did not accurately reflect "hundreds of exhibition[s]" of the movie on television.

Baiul sought summary adjudication on Sonar and Crown's affirmative defenses based on lack of standing.[2] She asserted that she "is an express creditor third party beneficiary of

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[2] Baiul also sought summary adjudication of defendants' affirmative defenses for statute of limitation, laches, res judicata, and collateral estoppel.

Defendants' obligation to pay a participation to OCL pursuant to the Rights Agreement (¶ 2). This participation must be accounted and paid to the William Morris Agency, [Baiul's] agent, for the account of OCL, who in turn is and was obligated to pay these sums to [Baiul]. . . . As a third party beneficiary of Defendants' promise to pay the participation due to OCL, [Baiul] is entitled to bring this action without naming OCL."

Baiul submitted an affidavit by Joseph Lemire, which had been filed in the United States District Court for the Central District of California, in a case by Baiul against Lemire, OCL, and the Republic of Ukraine (the Lemire action). In the affidavit, Lemire stated, "I am the sole director and the President of Olympic Champions Ltd., a Delaware corporation ('OCL-Delaware'). I was a director and the President of defendant Olympic Champions Ltd., a British Virgin Islands corporation ('OCL-BVI')." Lemire stated that OCL-Delaware was currently an active corporation, and OCL-BVI "was 'struck off' the register of companies in the British Virgin Islands on November 2, 2010 due to non-payment of the annual fee," because in about 2006, OCL-BVI stopped conducting business and shifted its business operations to OCL-Delaware. Lemire stated that "Baiul has never been a shareholder of OCL-BVI or OCL-Delaware."

Baiul also included an email from Lemire's counsel in the Lemire action to Baiul's counsel, which stated, "Having consulted with our client, OCL, we confirm that OCL does not authorize you or your client, Ms. Baiul, to take any action purportedly in the name of or on behalf of OCL. A long time ago, Ms. Baiul was employed by OCL (in 1994 to 1997), but she has never been a shareholder of OCL." Baiul stated in her motion that Lemire "asserted as a judicial admission that OCL has ceased conducting

business and is inactive," and that Lemire's counsel "refused to permit OCL as an inactive company to make an appearance in this action."

In addition, Baiul contended that she was entitled to summary judgment on Sonar's cross-complaint, which was "based entirely" on the allegation that Baiul violated the New York protective order. Baiul asserted that Sonar's cross-complaint had no merit.

2. *Opposition*

Sonar and Crown filed a joint opposition to Baiul's motion for summary adjudication. They asserted that "Baiul has been declared a vexatious litigant for engaging in a series of unsuccessful litigations for virtually identical, time barred, frivolous claims." In support of this contention, defendants cited an order from the litigation by Baiul against NBC and others in United States District Court for the Southern District of New York, in which the judge used the word "vexatious" in describing Baiul's litigation

Defendants asserted that Baiul did not have standing to sue under the rights agreement as a third party beneficiary. They argued that such rights apply only to those expressly included as a third party beneficiary in a contract, and the rights agreement did not expressly list Baiul as a third-party beneficiary. Defendants contended that any incidental benefit Baiul received as a result of the rights agreement was insufficient to establish standing. Defendants also argued that Baiul "failed to establish that she is entitled to an accounting," because she "failed to establish liability on her breach of contract claim." Defendants also contended that Baiul failed to

demonstrate that she was entitled to summary adjudication on their other affirmative defenses.[3]

Crown argued that Baiul failed to establish that Crown owes her any obligations. Baiul asserted that "Crown has assumed Sonar's obligations to pay" Baiul, but she failed to present any evidence in support of that statement. Sonar argued that Baiul failed to "carry her burden of production or persuasion to show the non-existence of a triable issue of fact on Sonar's Cross-Complaint."

Baiul filed a reply in support of her motion.

3. *Court ruling on Baiul's motion for summary adjudication*

The court denied Baiul's motion for summary adjudication in a written ruling on July 29, 2016. There is no transcript of the hearing in the record on appeal. Focusing on Baiul's request for an accounting, the court noted that the rights agreement "does not mention the motion picture at the center of this dispute, or indicate that Plaintiff was intended to be a third-party beneficiary." The court also stated, "There is no evidence that the Life Story [release] was assigned to Sonar or any other Defendants. Plaintiff's evidence fails to show that Plaintiff is a party to, or the intended third-party beneficiary of either agreement. Thus, there are triable issues of fact as to whether a relationship exists between Plaintiff and Defendants that

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[3]In addition, defendants challenged the admissibility of much of Baiul's evidence. They argued that Baiul failed to establish in her declaration that she had personal knowledge of the facts stated therein, and that she failed to establish a foundation to authenticate the documents attached to her declaration.

requires an accounting, and whether plaintiff even has standing to bring an accounting claim."

In a single paragraph addressing all of Baiul's arguments regarding defendants' affirmative defenses, the court stated that Baiul's "separate statement only sets forth facts in support of [her] motion for summary adjudication of [her] fourth cause of action for accounting. The affirmative defenses raise[d] by Defendants are inherently factual in nature and would likely require evidence to negate any of their essential elements. Although an affirmative defense can be adjusted as a matter of law, Plaintiff fails to set forth any basis for disposing of Defendant[s'] defenses."

Turning to Baiul's motion for summary adjudication on Sonar's cross-complaint, the court stated, "Plaintiff does not set forth any evidence in support of adjudication [of] Sonar's declaratory relief claim. As such, Plaintiff fails to carry her burden to show that there are no triable issues of fact as to Sonar's declaratory relief claim."

B. Defendants' motions for summary judgment

1. *Sonar's motion*

Sonar filed a motion for summary judgment a few days later, on August 5, 2016. It asserted three arguments: first, that Baiul lacked standing to sue under the rights agreement; second, that Sonar performed under the rights agreement; and third, that all of Baiul's causes of action were time-barred.

Regarding standing, Sonar asserted that the only parties to the rights agreement were OCL and RHI/Sonar. Sonar stated, "The Rights Agreement is clear that OCL had already acquired the rights to the life stories of Baiul, Petrenko, and Zmievskaya before contracting: 'Owner represents and warrants that the

Rights are exclusively owned and controlled by Owner.' . . . The 'Owner' is defined in the Rights Agreement as OCL." Sonar also argued that the rights agreement did not state that Baiul was a third party beneficiary or otherwise state any obligation to Baiul. To the extent the rights agreement stated that Sonar/RHI would pay the "owner," that person was OCL, not Baiul. Sonar argued that Baiul had admitted OCL was an active corporation. In addition, OCL had stated that Baiul did *not* have authority to pursue contract rights on its behalf. Sonar asserted that RHI was not a party to the life story release, which involved only OCL and Signboard Hill Productions.

Sonar also argued that it made all payments required under the rights agreement. It attached checks from September 1994 showing that the lump sum payments required by the rights agreement—two payments totaling $500,000—had been paid to William Morris Agency, as the agent for OCL. Sonar pointed out that these payments were not intended to discharge any duty to Baiul.

Sonar further contended that Baiul's four causes of action were time-barred. Sonar argued that Baiul signed the rights agreement on behalf of OCL in 1994 and knew of its terms at that time, so there was no basis for any delayed discovery claim. Sonar also asserted that Baiul's causes of action were barred by laches.

2. *Crown's motion*

Crown filed a motion for summary judgment the same day as Sonar. Crown argued that "[t]he plain language of the [rights] agreement unambiguously provides that only OCL is entitled to money which Baiul seeks to recover." It asserted that even if

Baiul could establish standing as to the rights agreement, Crown did not assume any rights or liabilities under that agreement. Crown acknowledged that it acquired the right to distribute the movie in 2001 when it purchased a library of titles from Hallmark Entertainment Distribution, LLC. Crown stated that it "only assumed the obligation to pay profit participants specifically identified in its agreement," and "[n]either Baiul nor OCL is identified among those profit participants." Crown sold "certain international rights" to the movie in 2005, and sold its remaining interests in the movie back to RHI in 2006 pursuant to what it calls the "2006 RHI Re-Purchase Agreement." Baiul was not listed as a profit participant in either of these sales. Any liabilities retained by Crown were re-assumed by RHI in 2011 pursuant to a television license agreement, which released Crown from liability for any "further payment or reimbursement of the Residuals and Participations."

Crown asserted that Baiul could not establish her causes of action for breach of contract, restitution, or accounting against Crown. It argued that because Baiul did not have standing to enforce the rights agreement, and because Crown had no obligations under the rights agreement, there was no triable issue of fact as to Baiul's breach of contract claim. And because the restitution and accounting claims arose from the same obligations in the rights agreement, those claims failed as well. Crown also filed a joinder to Sonar's motion for summary judgment.

3. *Baiul's opposition to defendants' motions*

Baiul filed separate oppositions to Sonar's and Crown's motions on October 5, 2016. The same day, she also filed a motion for leave to file a second amended complaint. In her

motion, she sought leave to add a declaratory relief cause of action to the complaint, and to add OCL as a Doe defendant. The declaratory relief claim would request a finding that "all sums and accounting due from Defendants . . . are the sole property of [Baiul] and due and payable solely to her." The hearing for the motion for leave to file an amended complaint was set for November 14, 2016; the hearing on the motion for summary judgment was set for October 19, 2016.

In her oppositions to the motions for summary judgment, Baiul cited Code of Civil Procedure, section 437c, subdivision (h),[4] and asserted that summary judgment would be premature "as discovery is ongoing after inadequate responses by Crown and Sonar to [Baiul's] efforts to obtain document production." She stated that the court had previously ordered Sonar to produce documents, which it had not yet done. Baiul also asserted that she served new discovery on defendants; "In particular, [Baoul] is submitting to Crown and Sonar numerous documents executed by her on behalf of OCL-BVI and reflecting OCL-BVI's status as her 'loan out' company, for admission of genuineness and authenticity." (Emphasis in original.)

Baiul also referenced her motion for leave to file an amended complaint, stating that OCL would likely default and

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[4] Code of Civil Procedure section 437c, subdivision (h) states in relevant part, "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

therefore "accede to her requested declaratory relief that she, not OCL-BVI, is entitled to any participation due to the rights agreement." Baiul would then bifurcate the trial to address the declaratory relief action first, which would "eliminate Crown and Sonar's pretense that no one can call them to account for failure to account and pay the participation due pursuant to the Rights Agreement."

Baiul asserted that she had standing under the rights agreement. She contended that "as a signatory to the Rights Agreement [Baiul] did have privity of contract with RHI, Sonar's predecessor, personally and through her loan-out company OCL-BVI." She also stated that "there is at least a triable issue of fact whether [Baiul] is a third party beneficiary of Defendants' obligation to pay a participation to OCL-BVI." She argued that "as a third party beneficiary of Defendants' promise to pay the participation due to OCL-BVI [Baiul] is entitled to bring this action without naming OCL-BVI." Baiul asserted that the "extent of [her] rights, as against OCL-BVI[,] her 'loan-out' company, and her ability to act on its behalf, is a highly disputed, triable issue of fact."

Regarding the defendants' statute of limitations defense, Baiul asserted that the court had already held that there was a triable issue of fact on this issue in its ruling on Baiul's motion for summary adjudication. She also asserted that there were continuing violations and continuing accruals, due to defendants' ongoing failure to pay Baiul as they collected money from the distribution of the movie. Baiul also asserted that her cause of action for fraud against Sonar did not accrue until she received the disputed statement, because "Defendants did nothing to put

her on inquiry that Defendants had not been paying her a participation."

In her opposition to Sonar's motion, Baiul disagreed with Sonar's assertion that it had complied with the rights agreement. She stated that the disputed statement did not reflect any "license fee from CBS for initial network exhibition of [the movie] or the advances payable for home video rights from Sonar's former affiliate Cabin Fever Entertainment," nor "any of the hundreds of exhibitions of [the movie] on the Hallmark Channels (confirmed in the 2011 TV License Agreement) or pursuant to Crown's In Demand license or pursuant to Sonar's licenses to Women's Entertainment Network."

In her opposition to Crown's motion, Baiul argued that Crown's agreements regarding the sale of the rights to the movie required Crown to pay "any and all" profit participations, and none of the documents relieved them of that obligation. She also asserted that there were triable issues of fact as to whether Crown assumed Sonar's obligation to pay the participation relating to the movie. Crown's SEC filings showed it had an obligation to pay residuals, and there was evidence that "Crown settled with the Director's Guild of America West for residuals due from distribution" of the movie.

Baiul also submitted a declaration from attorney Raymond Markovich, who stated that he was Baiul's "New York counsel" and was "associated with [Baiul's] California counsel who has newly substituted in this action." Markovich stated that "new counsel" had served requests for admissions, form interrogatories, and special interrogatories on Sonar and Crown. He continued, "Counsel further intends to seek several depositions of persons whose identity is requested in [Baiul's]

pending discovery." Markovich stated that "[f]acts may exist which [Baiul] is not able to present within the possession of Crown and/or Sonar relevant to the MSJ's which were or may be discovered through" the pending discovery. Such facts included what RHI understood about what Baiul would receive under the rights agreement, the intention of the parties under the life story release, whether Sonar "is the same juridical entity as RHI Entertainment Inc. and/or Signboard Hill Production, Inc.," as well as various liabilities as to Crown and Sonar.

4. *Defendants' replies*

In its reply, Sonar asserted that Baiul "concedes in her opposition papers that OCL, not she, entered into the Rights Agreement," and she "concedes that OCL is an existing company with the power to appear in its own litigation." Sonar contended that Baiul had not shown a triable issue of fact as to standing. Sonar also contended that no additional discovery was needed to determine the issues in the motion.

The record on appeal includes a declaration by Crown's counsel, which states on its cover page that it was filed concurrently with a reply, a response separate statement, and objections. No reply, response separate statement, or objections from Crown are included in the record on appeal, however. None of the parties noted this omission or requested that the record be augmented with this information.

5. *Hearing and court ruling*

At the hearing on defendants' motions for summary judgment on October 19, 2016, the court told Baiul's counsel that a continuance under section 437c, subdivision (h) was not warranted without specific information: "[Y]ou have to tell me something as to what evidence you plan on discovering. Whose

deposition do you plan on taking. Your request for [a] continuance was very vague . . . as to what you plan on doing." Baiul's counsel, who had substituted into the case shortly before the reply was filed, stated that he was still getting up to speed on the case and there was a "list of people" from whom discovery might be requested. The court asked, "Who?" Counsel responded, "I don't have that information on me right now." The court asked whose depositions were still needed, and Baiul's counsel said he hoped to determine that through further discovery. Baiul's counsel noted the recent discovery requests that had been served at the time of the opposition. The court asked which discovery requests would address Baiul's standing argument, and Baiul's counsel said, "I don't have that information." The court denied Baiul's request for a continuance and turned to the merits of the motion.

After a discussion on another issue,[5] Baiul's counsel mentioned the outstanding discovery again, and stated, "I . . . think we have enough . . . to rule on standing now, and we don't know if we're going to get anymore [*sic*]." The court asked, "Okay, so then you're okay with my just taking this under submission?" Counsel responded, "Yes, your honor." The court said, "Okay. Then it appears that the request for continuance is no longer requested, and I'll rule on the merits." The hearing concluded.

In a written order, the court granted defendants' motions. The court wrote that the rights agreement "unambiguously states

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[5] At the same hearing, the court also considered defendants' motion to have Baiul declared a vexatious litigant, which we have not described here because it is not relevant to the issues on appeal. The court denied the motion.

that the agreement is between" RHI and OCL. "Thus, Plaintiff is not a party to the Rights Agreement and can only enforce the Agreement if found to be a third party beneficiary." The court found that the rights agreement did not expressly state that Baiul was a third party beneficiary, and all payments were to be made to OHL as "owner." The court stated, "While Plaintiff purports to dispute these facts by way of declaration, Plaintiff's declaration fails to show that the Agreement is 'reasonably susceptible' to the interpretation urged by Plaintiff." The rights agreement made "absolutely no mention" that Baiul "was to receive any benefit, financial or otherwise." The court concluded, "Defendants have carried their burden to show that Plaintiff cannot prevail on any of her claims. Plaintiff fails to create any triable issue of fact in response. [¶] The motions for summary judgment are granted."[6]

Baiul filed a motion for reconsideration. The court entered judgment in defendants' favor.[7] Baiul timely filed a notice of appeal. The court thereafter denied Baiul's motion for reconsideration.

C. Discussion

1. *Standard of review*

Baiul contends that the trial court erred by granting summary judgment in favor of defendants. "A trial court will grant summary judgment where there is no triable issue of

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[6] The court also granted all requests for judicial notice and denied all objections, and stated that defendants' objections were "immaterial to the disposition of this motion." The court made no specific findings as to Baiul's objections.

[7] There is no mention of Sonar's cross-complaint in the judgment.

material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment must prove the action has no merit. He does this by showing one or more elements of plaintiff's cause of action cannot be established or that he has a complete defense to the cause of action. At this point, plaintiff then bears the burden of showing a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subds. (c), (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 849-850, [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850.)

On appeal following a motion for summary judgment, "'"[w]e review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

2. *Baiul was not a third party beneficiary under the rights agreement*

We begin with the threshold issue of whether Baiul has standing to assert claims against defendants based on the rights

agreement and other contracts relating to the movie. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (§ 367.) However, "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Civ. Code, § 1559.)

The parties agree that Baiul is not a direct party to the rights agreement. Instead, Baiul asserts that as a matter of law, she is a third party beneficiary of the rights agreement and has standing to sue RHI/Sonar based on the terms of that agreement, so the trial court erred by granting summary judgment on that basis. She also reasons that "[i]f Crown assumed and agreed to pay the Participation" in the rights agreement, then Baiul, "as a third party beneficiary of the Rights Agreement, may bring suit against Crown as a third party beneficiary of the RHI Repurchase Agreement" in which RHI re-acquired titles from Crown in 2006. Defendants assert that Baiul is not a third party beneficiary under either the rights agreement or any later agreements pertaining to the rights of the movie.

"[U]nder California's third party beneficiary doctrine, a third party—that is, an individual or entity that is not a party to a contract—may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821

(*Goonewardene*).) "All three elements must be satisfied to permit the third party action to go forward." (*Id.* at p. 830.)

a. *The motivating purpose of the contracting parties*

Both Sonar and Crown assert that Baiul cannot establish any of the three *Goonewardene* elements.[8] The parties' briefs focus primarily on the second element, the motivating purpose of the contracting parties. For this element, "the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Goonewardene, supra*, 6 Cal.5th at p. 830.) Baiul argues that Sonar/RHI "'must have understood' that some or all of the Participation due [from the movie] would be payable to [Baiul]. After all the film was based on [Baiul's] life!" Baiul also states that she "executed the Rights Agreement as a party," the rights agreement gave her a right to screen credit, and others—Lemire as administrator of OCL, Baiul's coach, and the William Morris Agency—received separate compensation. She asserts, "Under such circumstances, it beggars the imagination to suggest that [Sonar/RHI] could not have understood that some portion if not all of the Participation would be payable to [Baiul] by WMA as paymaster."

Sonar disagrees. It points out that there are no express provisions in the rights agreement stating any obligations to Baiul. It also asserts that under the third party beneficiary doctrine, an intent to benefit a third party must be evident in the language of the contract, and no such intent is evident here. In

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[8] The Supreme Court decided *Goonewardene* after briefing in this case was complete. We asked the parties for additional briefing to address the application of *Goonewardene* to the facts of this case. The parties each filed letter briefs in response.

addition, Sonar asserts that under *Goonewardene*, "knowledge by contracting parties of a benefit to a third party does not give that third party the right to enforce the contract." Crown asserts that the plain language of the rights agreement makes clear that the motivating purpose of the parties was to complete the agreement between Sonar/RHI and OCL, not to benefit Baiul.

This case bears some factual similarity to *Goonewardene, supra*, 6 Cal.5th 817. There, the plaintiff alleged that her employer, Altour, failed to pay wages due and then terminated her for pointing out the error. (*Id*. at p. 822.) She sued Altour and ADP, LLC, a payroll company that provided services to Altour. (*Ibid*.) In her breach of contract cause of action, the plaintiff alleged that she was a third party beneficiary of the contract between Altour and ADP. (*Id*. at p. 826.) After the trial court sustained ADP's demurrer, the plaintiff appealed and the Court of Appeal reversed, finding that ADP's obligations to employees "rendered each employee of Altour a creditor beneficiary of the Altour/ADP contract, on the theory that ADP's role under the contract was 'to discharge' Altour's wage obligations to its employees." (*Id*. at p. 833.)

The Supreme Court granted review. It discussed the "creditor-beneficiary" theory relied upon by the Court of Appeal, which exists when "one party to the contract (the promisor) agreed to pay a sum of money to a third party to discharge a preexisting debt of the other party to the contract (the promisee)." (*Goonewardene, supra*, 6 Cal.5th at p. 834.) The court held that "the Court of Appeal erred in characterizing plaintiff as a creditor beneficiary of the Altour/ADP contract and permitting the breach of contract action to go forward on this theory under the third party beneficiary doctrine." (*Id*. at pp. 833-834.) It continued,

"[T]here is nothing to suggest that ADP agreed to pay the wages that Altour owes to its employees out of ADP's own funds. Instead, . . . it appears that ADP . . . simply agreed to assist Altour by calculating the amount of wages that Altour owes to each employee." (*Id*. at p. 834.)

Turning to the three factors set out above, the court considered whether the "motivating purpose" factor had been met, and found it had not. "When an employer hires a payroll company, providing a benefit to employees with regard to the wages they receive is ordinarily not a motivating purpose of the transaction. Instead, the relevant motivating purpose is to provide a benefit *to the employer*, with regard to the cost and efficiency of the tasks performed and the avoidance of potential penalties. . . . [T]he relevant motivating purpose of the contract is simply to assist the employer in the performance of its required tasks, not to provide a benefit to its employees with regard to the amount of wages they receive." (*Goonewardene, supra*, 6 Cal.5th at p. 835.)

The court also found that the third factor—whether a third party breach of contract action would be consistent with the objectives of the contract—had not been met. The court said, "[E]ven if a motivating purpose of such a contract were to provide a benefit to employees with regard to wages they receive, it still would not follow that the employees would be entitled to sue the payroll company for breach of contract under the third party beneficiary doctrine." (*Goonewardene*, supra, at pp. 835-836.) The court reasoned that "permitting employees to sue a payroll company for alleged wage violations would ordinarily be inconsistent with the reasonable expectations of the employer as well as the payroll company and also unnecessary because

employees retain the right to obtain full recovery for unpaid wages from their employer." (*Id.* at p. 836.)

Here, similarly, there is no indication that the motivating purpose of the rights agreement was to benefit Baiul. In the rights agreement, OCL, in care of the William Morris Agency, was deemed the "owner." The rights agreement stated, "Owner represents and warrants that the Rights are exclusively owned and controlled by Owner." The profit participation clause in paragraph 2 stated that RHI was required to pay the owner. Paragraph 9 of the rights agreement stated, "All payments due Owner hereunder will be made payable to and in the name of the William Morris Agency, Inc. as agent for Olympic Champions Ltd." The owner had the right to audit RHI's books with respect to the agreement. The rights agreement included certain rights for Baiul specifically, such as the right to approve her ice skating double. It also provided that Zmievskaya would choreograph and stage the ice skating sequences, and Baiul and Petrenko may perform their own ice skating sequences.

No evidence presented in the trial court suggests that the motivating purpose of the contract was to benefit Baiul specifically. Instead, as Crown states, "it is clear from the plain language of the Rights Agreement that the parties' motivating purpose was for RHI to purchase exclusive rights to make and distribute a motion picture—and for OCL, not Baiul, to be paid for those rights." The evidence indicates that Baiul chose to work through OCL, and in some transaction not evident in the record, OCL became the owner of the rights to Baiul's story. The rights agreement states that OCL owns those rights. Although one could speculate that OCL or the William Morris Agency agreed to pay Baiul at least a portion of the profit participation from the

movie, neither the terms of the agreement nor any other evidence before the trial court suggests that this was the parties' motivating purpose behind the rights agreement.

Baiul argues that "the consideration due under the Rights Agreement was payable to [Baiul's] agent, WMA," but the rights agreement states that all payments are to be made to William Morris Agency "as agent for Olympic Champions Ltd."—not as Baiul's agent. Any incidental benefit to Baiul does not show that the parties' "motivating purpose" was to benefit Baiul. "A third party who is only incidentally benefited by performance of a contract is not entitled to enforce it." (*Eastern Aviation Group, Inc. v. Airborne Express, Inc*. (1992) 6 Cal.App.4th 1448, 1452.)

Baiul asserts that the holding of *Goonewardene* is, in essence, "Who's ultimately supposed to get the money? That person can sue. Who's ultimately responsible to pay the money? That person can be sued." We disagree with this interpretation. In *Goonewardene*, the employees were "supposed to get the money" owed to them pursuant to Altour's wage obligations. The Supreme Court expressly held that the employees' position was insufficient to establish standing as a third party beneficiary. In addition, the three-factor analysis in *Goonewardene* did not include a determination of who will ultimately be paid as a result of a contract.

This case is also not similar to *Schauer v. Mandarin Gems of California, Inc*. (2005) 125 Cal.App.4th 949 (*Schauer*), which Baiul cites. In that case, a man bought an engagement ring "'for the sole and stated purpose of giving [the ring]'" to his fiancée. (*Id*. at p. 958.) After the couple divorced and the ring was deemed the wife's personal property, the wife discovered that the jeweler had misrepresented the quality of the diamond and the

value of the ring. (*Ibid.*) She sued the jeweler for breach of contract under a third party beneficiary theory, and the defendant successfully demurred. The Court of Appeal reversed, holding that the wife had adequately alleged facts to support her third party beneficiary claim: "[T]he pleading here meets the test of demonstrating plaintiff's standing as a third party beneficiary to enforce the contract between [the husband] and defendant. The couple went shopping for an engagement ring. They were together when plaintiff chose the ring she wanted or, as alleged in the complaint, she 'caused [the ring] to be purchased for her.' [The husband] allegedly bought the ring 'for the sole and *stated* purpose of giving [the ring]' to plaintiff. (Italics added.) Under the alleged facts, the jeweler *must* have understood [the husband's] intent to enter the sales contract for plaintiff's benefit. Thus, plaintiff has adequately pleaded her status as a third party beneficiary, and she is entitled to proceed with her contract claim against defendant to the extent it is not time-barred." (*Ibid.*)

Baiul also relies on *Lucas v. Hamm* (1961) 56 Cal.2d 583 (*Lucas*), which was also decided following a demurrer. There, a man hired the defendant attorney to draft a will and related documents; the plaintiffs were to be beneficiaries. The attorney, "in violation of instructions and in breach of his contract, negligently prepared testamentary instruments" that were invalid pursuant to statute. (*Id.* at p. 586.) After the testator died, the plaintiffs discovered they "would be deprived of the entire amount to which they would have been entitled if the provision had been valid." (*Id.* at p. 587.)

The Supreme Court held that the plaintiffs could sue as third party beneficiaries: "[T]he main purpose of the testator in making his agreement with the attorney is to benefit the persons

named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action." (*Lucas, supra*, 56 Cal.2d at p. 590.) The court also stated, "Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent." (*Id*. at p. 591.) Under the circumstances of that case, "a contract for the drafting of a will unmistakably shows the intent of the testator to benefit the persons to be named in the will, and the attorney must necessarily understand this." (*Id*. at p. 590.)

Here, by contrast, the contract was not made by other parties for the benefit of Baiul. Instead, the evidence indicates that OCL, as sole owner of the rights to the stories of Baiul, Petrenko, and Zmievskaya, entered the contract with Sonar/RHI. Even if OCL and Baiul had a separate agreement that Baiul would be paid all or some of the profit participation—a proposition that Baiul has not supported by any evidence—that fact would not support a finding that the parties' motivating purpose in entering into the rights agreement was to benefit Baiul.

Baiul also argues that the life story release supports her third party beneficiary theory. She notes that the life story release acknowledged the rights agreement, and stated that the rights to her life story were exchanged for "good and valuable consideration." Baiul argues, "If [Baiul] granted her life story rights, conditioned upon payment of the Participation, then it follows as a matter of logic" that she has standing to assert her causes of action relating to the participation. She also contends that "[b]ased on the terms of the Life Story Agreement alone,

Sonar [RHI] must have understood that OCL-BVI would pay all or at least some part of the Participation" to Baiul.

Sonar notes that neither Sonar nor RHI is a party to the life story release, and it is not signed by anyone from Sonar or RHI. Instead, it is signed by an unidentified "authorized officer" of OCL. It also states, "Agreed insofar as we are concerned," with accompanying signatures of Baiul, Petrenko, and Zmievskaya. The life story release does not suggest that Sonar and OCL entered into the rights agreement for Baiul's benefit. Furthermore, since there is no evidence that Sonar/RHI ever received a copy of the life story release, it does not support Baiul's argument that based on the release's terms, Sonar "must have known" that the rights agreement was made for the benefit of Baiul.

b. *Permitting a breach of contract action by a third party*

The court in *Goonewardene* also stated that a third party beneficiary claim is appropriate when "permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Goonewardene, supra*, 6 Cal.5th at p. 821.) This element "calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (*Id.* at p. 831.) Thus, "even if a motivating purpose of the contracting parties is to provide a benefit to the employees, it still may be inconsistent with the objectives of the contract and the reasonable expectations of the contracting parties to permit"

the third party to sue for alleged breach of the contract. (*Id*. at p. 836.)

The *Goonewardene* court stated that this factor was not met for the employee plaintiffs, because the employer, Altour, "is available and is fully capable of pursuing a breach of contract action against ADP if, by failing to comply with its contractual responsibilities, ADP renders Altour liable for any violation of the applicable wage orders or labor statutes. Simply put, permitting an employee to sue ADP for an alleged breach of its contractual obligations to Altour is not necessary to effectuate the objectives of the contract." (*Goonewardene, supra*, 6 Cal.5th at p. 836.) The court contrasted *Lucas, supra*, 56 Cal.2d 583, in which "the testator was no longer available to bring a breach of contract action against the attorney, [thus,] it was consistent with the objectives of the contract and the reasonable expectation of the contracting parties to permit the intended beneficiaries of the will to bring such an action at that time to enforce the attorney's alleged breach of the contract." (*Goonewardene, supra*, 6 Cal.5th at p. 832.)

Baiul asserts that this case is more similar to *Lucas*, because Joseph Lemire, director and president of OCL, "specifically refused to pursue a claim against Sonar and Crown, even at [Baiul's] expense, and claimed that OCL-BVI is 'defunct.'" However, Baiul does not cite any evidence to support this fact. In the affidavit Baiul filed in the trial court, Lemire stated that OCL was an active Delaware corporation, and after OCL-BVI ceased operations in 2006, its assets were transferred to OCL-Delaware. Baiul presented no evidence that OCL-Delaware was unavailable or legally unable to assert contract rights against Sonar, either as a continuation of OCL or as OCL-BVI's successor in interest.

This evidence does not suggest that a breach of contract suit by Baiul individually, rather than by OCL, would be consistent with the objectives of the contract.

3. *Baiul as a third party beneficiary to the RHI repurchase agreement*

As to Crown, Baiul asserts that she was a third party beneficiary to the 2006 RHI repurchase agreement in which RHI re-acquired titles from Crown. She contends, "If Crown assumed and agreed to pay the Participation, then [Baiul], as third party beneficiary of the Rights Agreement, may bring suit against Crown as a third party beneficiary of the RHI Repurchase Agreement. If the expressed intent of the promise (Sonar/RHI) . . . was for Crown to pay all participations due on the RHI Library for the benefit of the participants including [Baiul], then [Baiul] would be an implied donee third party beneficiary of the RHI Repurchase Agreement."

Crown asserts Baiul has forfeited any assertion that she is a third party beneficiary to the RHI repurchase agreement, because she did not make this argument in the FAC or her opposition to Crown's motion for summary judgment. Crown is correct that there is no such allegation in the FAC, and therefore Baiul could not defeat summary judgment on this basis. (See, e.g., *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225 ["'The complaint serves to delimit the scope of the issues before the court on a motion for summary judgment [citation], and a party cannot successfully resist summary judgment on a theory not pleaded.'"].) However, Crown is incorrect in asserting that Baiul did not raise the issue in her opposition to Crown's motion for summary judgment; there, she asserted that Crown was liable to Baiul based on the

RHI repurchase agreement. The issue therefore has not been forfeited.

Nevertheless, this assertion does not warrant reversal of the summary judgment. Baiul has not established that she was a third party beneficiary to the rights agreement, and her argument that she was a third party beneficiary under the repurchase agreement is derivative of that assertion. Even assuming Baiul is correct that Crown assumed the liability to pay the participation under the rights agreement, Crown would be liable to OCL, not Baiul. Thus, Baiul has not established a triable issue of fact as to her standing as a third party beneficiary of the RHI repurchase agreement.

4. *Baiul as successor in interest to OCL*

Baiul also asserts that there were triable issues of fact as to "[w]hether [Baiul] owns a legal or beneficial ownership in OCL-BVI and hence [is] authorized to act on OCL-BVI's behalf," and "[w]hether [Baiul] is the successor in interest of OCL-BVI." In support of this argument, Baiul states that Lemire, director of OCL, "has stated in writing that [Baiul] is the owner of OCL-BVI."

Baiul cites a fax to Baiul from Lemire dated April 12, 1996. It provides tax information to Baiul, and states in part, "In August 1994 you formed Olympic Champions, Ltd. with other Olympic skaters. Pursuant to the formation of the company, you executed an employment agreement (a loan-out agreement) wherein the corporation paid you a monthly salary." It also states that the corporation paid taxes on "excess earnings over your monthly salary," and paid personal income taxes on Baiul's salary.

Baiul does not provide any argument or legal authority supporting her contention that this information could support a finding that Baiul was the successor in interest to OCL-BVI. Moreover, as discussed above, the Lemire affidavit Baiul submitted suggests that OCL-Delaware, an active corporation, has continued the operations begun by OCL-BVI. Baiul does not set forth any argument or authority supporting her contention that she, rather than OCL-Delaware, is the legally appropriate successor in interest to OCL-BVI. Thus, Baiul has not demonstrated a triable question of fact as to this issue.

5. *Baiul is not entitled to an accounting.*

Baiul asserts that she is entitled to "an interlocutory order for accounting" from both Sonar and Crown due to the "relationship" that was established through the rights agreement. "A cause of action for accounting requires a showing of a relationship between the plaintiff and the defendant, such as a fiduciary relationship, that requires an accounting or a showing that the accounts are so complicated they cannot be determined through an ordinary action at law." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1413.) As we have found that the rights agreement did not create any obligations toward Baiul individually, this argument fails.

6. *Baiul's motion for summary adjudication*

Baiul also contends that the trial court erred by denying her motion for summary adjudication on defendants' affirmative defenses of statute of limitations, laches, res judicata, collateral estoppel, and standing. We have addressed the standing issue above, which is dispositive. The remaining arguments are therefore moot, so we do not address them.

7. *Baiul's request for a continuance under section 437c, subdivision (h)*

In her opening brief, Baiul asserts that even if she was not a third party beneficiary or successor in interest to OCL-BVI as a matter of law, "at a minimum" there were triable issues of fact on this question, and the motions for summary judgment should have been denied "by reason of pending discovery." Sonar and Crown assert that Baiul's counsel expressly waived any such grounds for an appeal by telling the court at the hearing that there was sufficient information available to decide the standing issue.

At the hearing on the motions for summary judgment, the court asked Baiul's counsel about the specific discovery needed to address the motions for summary judgment. Baiul's counsel did not provide any specific information about discovery, and eventually stated, "I . . . think we have enough . . . to rule on standing now, and we don't know if we're going to get anymore [*sic*]." The court asked, "Okay, so then you're okay with my just taking this under submission?" Counsel responded, "Yes, your honor." The court said, "Okay. Then it appears that the request for continuance is no longer requested, and I'll rule on the merits."

In her reply brief, Baiul asserts that "counsel was not waiving [the] separate argument that discovery was required to establish her separate allegation in the FAC that she was the successor in interest to OCL-BVI and entitled to act for it, seeking a declaration to that effect, with OCL-BVI added as a defendant." However, Baiul's counsel told the court at the hearing that the issue of *standing* could be decided without further discovery. Counsel did not differentiate standing

theories—third party beneficiary and successor in interest. "'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403.) After telling the trial court that there was sufficient evidence to determine standing, Baiul cannot now assert that the court erred by considering that issue.

Baiul also asserts on appeal that the trial court should have granted leave to file the second amended complaint before ruling on the defendants' motions for summary judgment. She argues that "[a]ll of the (bogus) arguments made by Crown and Sonar to avoid their liability for repudiation of the Participation could be simply resolved when OCL-BVI defaults (as it will) in response to the SAC and [Baiul's] rights to the Participation [are] thereby confirmed." Even assuming Baiul's speculation as to OCL's future actions is correct, this still speaks directly to the standing issue that Baiul waived at the hearing.

Moreover, even if this issue had not been waived, Baiul's request for a continuance did not meet the requirements of section 437c, subdivision (h). In her opposition to defendants' motions for summary judgment, Baiul stated that she submitted documents and discovery requests to Sonar and Crown "reflecting OCL-BVI's status as [Baiul's] 'loan out' company, for admission of genuineness and authenticity." Markovich's declaration, attached to the opposition, stated that "facts may exist" regarding several issues, then simply asserted key factual points that Baiul wanted to establish, such as that RHI "must have understood that [Baiul] would receive some or all of the participation due to OCL-BVI." The declaration did not cite any particular discovery requests or connect any request with Baiul's standing arguments.

Moreover, when the court asked Baiul's counsel for specific information relevant to the motion that could be revealed in discovery, counsel did not provide any relevant information.

These statements did not satisfy section 437c, subdivision (h). "Code of Civil Procedure section 437c, subdivision (h) requires more than a simple recital that 'facts essential to justify opposition may exist.' The affidavit or declaration in support of the continuance request must detail the specific facts that would show the existence of controverting evidence." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715.) Thus, an "attorney's bald assertion that facts essential to justify opposition may have existed," without a "clear statement as to what those facts may have been," is insufficient to warrant a continuance. (*Ibid.*) "The statute cannot be employed as a device to get an automatic continuance by every unprepared party who simply files a declaration stating that unspecified essential facts may exist. The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented." (*Id*. at pp. 715-716.) Baiul did not do so here.

Because Baiul waived any request for a continuance on standing grounds, and her request for a continuance did not meet the requirements of section 437c, subdivision (h), the trial court did not err in deciding the motions for summary judgment rather than continuing the hearing.

IV.

Baiul also challenges the trial court's rulings on the parties' sanctions requests in two orders relating to discovery motions: the March 21 order and the September 9 order. In short, the trial court denied Baiul's request for attorney fee sanctions associated

with those motions, and in the September 9 order, granted Crown's request for sanctions. Baiul contends these rulings constituted an abuse of the trial court's discretion.

A. The March 21 order

1. *Baiul's motion to compel Sonar to produce documents*

On January 8, 2016, Baiul filed a motion to compel Sonar to produce documents. Baiul contended that Sonar refused to produce any documents in response to Baiul's document requests on the basis that Sonar had already produced responsive documents in the New York litigation, and those documents were in Baiul's possession. However, Sonar also argued that Baiul's California counsel could not view the documents without violating the New York protective order. Baiul's counsel attached a declaration stating that he had met and conferred with Sonar's counsel regarding the discovery dispute, and was unable to reach a resolution. Baiul requested $12,000 in attorney fees as a sanction under section 2031.300, subdivision (c).

In its opposition to Baiul's motion, Sonar argued that Baiul was seeking "the same confidential documents she already possesses improperly, and which she has intentionally mishandled in violation of a court order. This discovery abuse is merely the latest in a long string of litigation abuses, frivolous pleadings, and blatant forum shopping stretching back more than three years and resulting in nothing but sanctions against [Baiul's] counsel." Sonar stated that it "recognizes its discovery obligations under California law. But first, the allegations in and exhibit to the First Amended Complaint that incorporate and make public Sonar's confidential, protected information must be stricken, a protective order must be entered regarding the use of confidential documents in this case, and Baiul must be

sanctioned for her contemptable litigation behavior." Sonar further asserted that Baiul lacked good cause for her motion, because "Baiul has already shown that when confidential, protected information is produced to her, as it was in the New York Action, she will abuse the discovery process, use the information improperly, and publicize the information regardless of her agreement to the contrary." Sonar requested an award of the attorney fees it incurred in opposing the motion.

2. *Sonar's motion for a protective order and sanctions*

On February 1, 2016, Sonar filed a motion seeking (1) a protective order, (2) sanctions, and (3) to strike portions of the FAC, including the fraud cause of action and the disputed statement attached to the FAC, which Sonar claimed was filed in breach of the New York protective order. Sonar argued that Baiul was a "professional litigant" who was "forum shopping . . . in an attempt to squeeze more money from her former fame." Sonar said it would "produce responsive, non-privileged documents, if any, in response to Baiul's [discovery] requests if Baiul demonstrates she will adhere to court orders."

Sonar filed a request for judicial notice in support of its motion. The attached documents, totaling more than 1000 pages, consisted mostly of court documents from other lawsuits in state and federal courts in California and New York, in which Baiul sued NBC Universal, William Morris Agency, Sonar, and other entities. The documents included a June 2014 stipulation and protective order from a case in New York state court addressing the exchange of confidential information in discovery. The protective order was signed by counsel for Sonar and Baiul, as well as the judge in that case. Sonar argued in its motion in this case that Baiul's counsel in New York "represented Baiul in the

New York Action, and in that capacity was entitled to review" the documents encompassed within the protective order in that case. Baiul's California counsel, on the other hand, "is not authorized to review the New York Production."

Sonar asserted that information from the protected documents "explicitly forms the basis for material allegations in the FAC" and that one protected document—the disputed statement—was attached to the FAC as an exhibit. It argued that "Baiul's mishandling of confidential documents obtained in one discovery process and using them to start a new lawsuit is egregious, and justifies imposing sanctions in a measure proportionate to Baiul's conduct, namely striking the offending pleadings and awarding attorney fees." Sonar also requested "a protective order regarding the use of disclosure in this case."

Baiul opposed Sonar's motion, arguing that the New York protective order did not support Sonar's position. Baiul also asserted that it was improper for Sonar to refuse to engage in discovery based on a purported violation of the New York protective order, and that Sonar's remedy for any purported violation was with the New York court. Baiul asked that Sonar's motion be denied and that Baiul be awarded $8,000 in attorney fees for defending against the motion under section 2023.010, subdivision (h).

3. *Baiul's motion to compel discovery from Crown*

On February 26, 2016, Baiul filed a motion to compel Crown to produce documents, and to compel the depositions of Crown's person most knowledgeable (PMK) and custodian of records. (See § 2025.030.) Baiul asserted that Crown responded to Baiul's discovery requests with baseless objections, including that the requests were vague, violated Crown's privacy, and

called for premature expert discovery. Baiul alleged that RHI entered into the rights agreement in 1994, and through a series of sales and acquisitions, the rights to the movie changed hands several times. Baiul asserted that the information she sought from Crown directly related to the acquisitions and Crown's liability, and therefore Crown should be compelled to produce the information requested. Baiul requested a sanction of $8,000 in attorney fees and costs.

Crown opposed Baiul's motion. In the opposition and attached attorney declaration, Crown said it offered to schedule a deposition for its PMK, began production of non-confidential documents, and worked with Baiul's counsel to secure a protective order. Nonetheless, Baiul filed the motion without mentioning these efforts. Crown characterized counsel's actions as an "utter failure to meet and confer" that warranted denial of the motion and the imposition of monetary sanctions.

4. *Court ruling*

There is no hearing transcript relating to these motions in the record on appeal. The court decided all three motions in a single order dated March 21, 2016. The court granted Sonar's request for judicial notice of the documents filed in other litigations. The court denied Sonar's motion to strike and for sanctions, stating that the purportedly confidential document at issue in Sonar's motion "appears to be an accounting statement to William Morris Agency, an agency that represents plaintiff. This document appears to be the property of plaintiff, and as such, plaintiff is free to do what she wishes with this document. Sonar does not explain why this particular accounting statement is confidential." The court also stated, "If Sonar feels plaintiff's filing of [the disputed statement] is a violation of the NY

Protective Order, Sonar can seek[ ] redress from the New York court that issued said order."

Turning to Baiul's motion to compel production of documents from Sonar, the court stated that in response to Baiul's requests, Sonar "set forth the same objection to each RFP," but "Sonar fails to justify these objections in its opposition, and instead contends that a privilege order is necessary. To the extent that Sonar claims that certain documents are privileged, it must serve a privilege log. To the extent Sonar claims that certain documents are confidential information . . . the parties shall meet and confer concerning a stipulation for a protective order." The court therefore granted Baiul's motion, but denied Baiul's request for sanctions. The court stated, "The court finds that there was substantial justification for Sonar's objections and request for a protective order concerning confidential information, such as, trade secrets, proprietary business information and competitively sensitive information."

As for Baiul's motion to compel against Crown, the court stated, "[I]t appears that Crown has agreed to produce the requested discovery." The court ordered Crown's PMK to be deposed within 45 days of the order, and to the extent additional depositions were required, the court ordered the parties to meet and confer. The court stated, "Given that Crown served supplemental responses, which were omitted from Plaintiff's separate statement, it appears that this motion was entirely unnecessary. As such, Plaintiff's request for sanctions is denied."

B. The September 9 order

1. *Baiul's motion to compel discovery from Sonar*

Baiul filed a motion to compel Sonar to produce documents to the same requests at issue in Baiul's previous motion to

compel. She asserted that Sonar served amended responses following the March 21 order, but it reasserted its boilerplate objections, "refused to produce any documents," and referred Baiul to the "undifferentiated mass of documents" Sonar produced in the New York litigation. In addition, she asserted that relevant "'package' license agreements" were not produced in the New York litigation.

Baiul requested an award of attorney fees under sections 2023.030, subdivision (a) and 2031.300, subdivision (c). Baiul's counsel submitted a declaration stating that he contacted Sonar's counsel about the discovery on May 26, 2016, and Sonar's counsel responded by letter on May 27. Baiul's counsel stated that they were "not able to resolve" the dispute. In the May 27 letter from Sonar's counsel, which was attached to the declaration, Sonar's counsel stated that Sonar was dissatisfied with Baiul's discovery responses as well, and offered to confer about both sets of discovery on June 1 or 2. Baiul's motion to compel was filed on May 31.

Sonar argued in its opposition that Baiul's motion should be denied and sanctions against Baiul and her counsel should be imposed. Sonar stated that 10,000 pages of documents had been served in 2014 in the New York litigation. After the court's March 21 order, "Sonar made the production to Baiul on April 11, 2016, by permitting Baiul to use in this litigation the documents produced in the New York litigation, which Baiul has in her possession." Sonar argued that Baiul's counsel admitted in the motion to compel that he had not even reviewed the production before filing the motion, which constituted a misuse of the discovery process.

Sonar also contended that its production was "a well-organized group of relevant and responsive documents." However, Sonar also stated that due to downsizing and the difficulty of finding documents in off-site storage, "it would cause undue expense and undue burden to attempt to locate" some of the documents Baiul sought. Sonar requested that Baiul's motion be denied and that Baiul be sanctioned for failing to meet and confer.

In her reply, Baiul asserted that other than the disputed statement, Sonar's "10,000 page 'document dump' produces no financial information whatsoever regarding revenues from the use and distribution" of the movie. Baiul's counsel said that contrary to Sonar's representation, counsel had reviewed and indexed the production. Baiul also asserted that her communication with Sonar constituted a sufficient meet-and-confer effort because Sonar's counsel only "stonewalled" and never offered to supplement the production.

2. *Baiul's motion to compel discovery from Crown*

Baiul also filed a motion to compel Crown to produce documents. Baiul contended that she served Crown requests for production of documents "in light of the evasive, non-responsive answers" in the deposition of Crown's PMK. Crown's responses to Baiul's request "mash[ ] together claims that Crown doesn't have requested documents with wide-ranging improper nuisance objections." She asserted that Crown's written responses stated that it had "produced all relevant, non-privileged documents related to" the movie, but Crown's PMK testified that Crown produced a "more narrow categories of documents" that Crown "felt were responsive" to Baiul's requests. Baiul asserted that Crown had not produced any documents "showing any income or

expense" from the distribution of the movie, any broadcast or exhibition of the movie, or any "calculation of ultimates or values of" the movie.

Baiul requested $18,000 in attorney fees under section 2023.030, subdivision (a) and 2031.300, subdivision (c). A declaration by Baiul's counsel attached to the motion discussed a series of letters to and from Crown's counsel. Most of the letters discussed discovery not at issue in the motion, such as the documents produced in relation to the deposition of Crown's PMK. In one letter dated July 19, 2016, Baiul's counsel expressed disapproval of Crown's objections and production, and stated, "We will not make progress if you continue to make such statements and stand by your blanket objections and non-production of documents. If you do, then the motion will be filed." Baiul's motion was filed on July 22.

Documents associated with Crown's opposition are in the record on appeal, but Crown's actual opposition to Baiul's motion is not. In the separate statement in support of its opposition, Crown stated that Baiul failed to engage in a good faith effort to meet and confer. In addition, Crown stated that it "produced, and continues to produce" relevant documents "without need for this Court's intervention." Crown also asserted that Baiul's requests were overly broad in that they sought documents not related to the movie.

A declaration by Crown's counsel stated that Crown had "begun producing additional documents . . . recently discovered by Crown" that were relevant to the case. Counsel also stated that Crown "incurred well in excess of $10,000 in attorneys' fees and costs" responding to Baiul's motion.

In her reply, Baiul stated that she had evidence that the movie had been shown on Crown's Hallmark channel, but Crown professed to have no information about that. Baiul asserted that Crown's representation that it might produce documents in the future was insufficient to meet its discovery duties.

3. *Ruling*

There is no transcript of the hearing in the record on appeal. In a short written order, the trial court granted Baiul's motion as to Sonar, stating, "Sonar's supplemental responses assert similar objections to those in its original responses, and again refers Plaintiff to is prior production in the New York Litigation. Sonar is once again ordered to provide supplemental responses without objections that are in compliance with the California Code of Civil Procedure." The court found, however, that Baiul's motion was filed "without engaging in a good-faith meet and confer effort." The court noted that Baiul's counsel sent a letter on May 26, Sonar's counsel proposed to confer on June 1 or 2, and Baiul filed her motion on May 31. Thus, "the Court finds that Plaintiff's meet and confer efforts were inadequate. As such, the court is denying any monetary sanctions."

The court denied Baiul's motion as to Crown. It noted that Crown stated that it had conducted a diligent search and produced all relevant, non-privileged documents, in compliance with section 2031.010. In her motion, Baiul "fail[ed] to show why further response is required." In addition, Crown established that Baiul failed to adequately meet and confer. The court stated that Crown's requested sanction of $10,000 was excessive, but awarded Crown $3,660, calculated as 9 hours at $400 per hour, plus a $60 filing fee.

C. Discussion

On appeal, Baiul asserts that the trial court "abused its discretion in failing to order monetary sanctions against both Crown and Sonar" in the March 21 and September 9 orders. She also contends that she is entitled to reversal of the sanctions awarded to Crown in the September 9 order.

As a threshold matter, Crown asserts that these issues are not reviewable on appeal. Crown cites section 906, which states that in an appeal following a final judgment, "the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." Crown asserts that because the court's sanctions rulings do not (1) involve the merits of the appeal, (2) affect the judgment, or (3) substantially affect Baiul's rights, they are not reviewable. Crown cites *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 948 (*Cahill*), in which the Fourth District stated that under section 906, "nonappealable orders or other decisions substantively and/or procedurally collateral to, and not directly related to, the judgment or order being appealed are not reviewable pursuant to section 906 even though they literally may 'substantially affect[ ]' one of the parties to the appeal." (*Ibid.*)

Division Eight of this court distinguished *Cahill* in *In re A.L.* (2014) 224 Cal.App.4th 354 (*A.L.*). The court noted that *Cahill* "involved an appeal from an appealable order that was not the final judgment." (*Id.* at p. 362 fn. 4.) The court noted that the case before it involved an "appeal . . . from the disposition—the equivalent of the final judgment in the case. If A.L. cannot obtain review of the order now, on appeal from the final

judgment, she can never obtain review of an order that substantially affects her rights. In our view, section 906 on its face clearly provides otherwise." (*Ibid.*)

We find *A.L.* persuasive for the principle that on an appeal from a final judgment, discovery orders are typically reviewable. "[G]enerally discovery rulings are not directly appealable and are subject to review only after entry of a final judgment." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1060.) Here, the appeal is from the final judgment, and interpreting section 906 narrowly under the circumstances would render the sanctions orders unreviewable. That does not appear to be consistent with the language of section 906, which specifically allows for the review of intermediate rulings and orders in an appeal following a final judgment.

Turning to the merits of Baiul's contentions, we consider the court's sanctions orders under the abuse of discretion standard. (See, e.g., *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390 [""The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action.""].) Baiul has not demonstrated that the trial court abused its discretion by denying her requests for sanctions, or by granting Crown's request in the September 9 order.

Section 2023.030, subdivision (a), states that a court may order "one engaging in the misuse of the discovery process [to] . . . pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (§ 2023.030, subd. (a).) This subdivision continues, "If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with

substantial justification or that other circumstances make the imposition of the sanction unjust." (*Ibid.*) "Misuses of the discovery process include . . . opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (§ 2023.010, subd. (h).)

Baiul focuses on the phrase "substantial justification" in section 2023.030, which "has been understood to mean that a justification is clearly reasonable because it is well-grounded in both law and fact." (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1434.) Baiul asserts that defendants' oppositions to her discovery motions lacked substantial justification, and that defendants clearly engaged in stonewalling and obfuscation.

Baiul does not address the language in section 2023.030, subdivision (a), stating that a trial court may choose not to impose sanctions if "other circumstances make the imposition of the sanction unjust." In the March 21 order, the court expressly found substantial justification for Sonar's objections and request for a protective order. The court also found that Baiul's motion against Crown was unnecessary because Crown had already provided the information Baiul sought. In the September 9 order, the court found that Baiul failed to comply with the meet-and-confer requirements for discovery motions as to both Sonar and Crown, which is itself a misuse of the discovery process. (See § 2023.010, subd. (i) [misuse of the discovery process includes "[f]ailure to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery."].) The court's holdings that Baiul was not entitled to sanctions against either Sonar or Crown under these circumstances, and that

Crown was entitled to sanctions in the September 9 order, were not arbitrary, capricious, or whimsical.

Baiul takes issue with several of the court's findings and defendants' arguments. She asserts, for example, that Sonar's request for a protective order was a disingenuous delay tactic, and that defendants had no basis for requesting that any documents be deemed confidential. She also argues that Sonar's failure to comply with the March 21 order was "obvious on its face," necessitating the discovery motions leading to the September 9 order. Baiul also claims that her counsel "sent 8 letters and emails to Crown's counsel" in a meet-and-confer effort. However, most of these letters involved discovery not at issue in the motion, and were sent before Crown's relevant discovery responses were even due. After Sonar's counsel offered to meet and confer, Baiul filed a motion to compel without conferring.

Although Baiul is correct that Sonar's actions were hardly an example of exemplary litigation behavior, Baiul's counsel's own failure to adequately meet and confer before filing multiple discovery motions was also not appropriate. Under the circumstances, the court was well within its discretion in denying Baiul's sanctions request and in awarding sanctions to Crown. Baiul has not demonstrated that the trial court's sanctions orders were an abuse of discretion.

DISPOSITION

The judgment is affirmed. Sonar and Crown are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.